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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES STEPHEN BENNETT,

Defendant and Appellant.

G039812

(Super. Ct. No. 05NF4584)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffery J. Koch, Deputy Attorney General, for Plaintiff and Respondent.

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Defendant contends the court erred in instructing the jury. We disagree with his contentions and affirm his convictions.

I

FACTS

A jury found defendant James Stephen Bennett guilty of second degree burglary as charged in count one of the information, forgery as charged in count two and possession of a forged instrument as charged in count three. The court suspended imposition of his sentence, and placed defendant on three years formal probation with numerous terms and conditions, including serving 270 days in the Orange County jail.

Anaheim Police Officer Jack Poland was given a check from Pickford Escrow Company and an application card to cash a check by Beverly Smith who works at the Dollar Depot store in Anaheim, a check cashing facility. Defendant had filled out the application card and presented the check to Dollar Depot. Smith called Pickford Escrow and found out the check was counterfeit.

Poland spoke with defendant about the check, and defendant said “he received the check by mail from a subject that was attempting to purchase Cadillac auto parts from him, that this subject was — had purchased these parts by the Internet, through a sale on the Internet, and that subject sent him this \$2,000 check. He was to use 1200 of it for the purchase of these parts this subject was going to buy. He was going to send the parts and the remainder of the check, which is \$800, back to this unnamed subject by mail.” Regarding the person who supposedly sent him the check, defendant told Poland he “had no information on this subject, no name, no address, nothing essentially. . . . [¶] No phone number, nothing.”

Mary Schwacher, employed by Pickford Escrow in Laguna Niguel, testified she tried to match the number on the check defendant presented to the Dollar Depot with the escrow number on the check, but the numbers did not match. She said the check had

originally been made out to the State of California as the payee, and added the font used on the check is different from the font used by Pickford Escrow on its checks.

II

DISCUSSION

Defendant contends CALCRIM No. 223¹ and No. 302² “undermined the presumption of innocence and shifted the burden of proof” to him. With regard to No. 302, specifically, he says it “improperly shifted the burden of proof by telling jurors that in the event of a conflict in the evidence it was required to decide which evidence to believe.”

In deciding whether or not jury instructions correctly conveyed the law, the reviewing court must look to the instructions as a whole to see whether there is a reasonable likelihood the jury misunderstood the instructions. (*Estelle v. McGuire* (1991))

¹ CALCRIM No. 223 as read to the jury by the court states: “Facts may be proved by direct or circumstantial evidence or a combination of the two. Direct evidence proves a fact by itself. For example, a witness testifies he saw it raining outside before he came into the courthouse. This is direct evidence because it’s evidence on the topic of whether it was raining or not outside. [¶] Circumstantial evidence, on the other hand, also called indirect evidence, doesn’t directly prove the fact to be decided, but it’s evidence instead of another fact or group of facts from which you can then conclude the truth of the fact in question. For example, a witness testifies he saw someone come inside wearing a raincoat covered with drops of water. This is circumstantial evidence because it may support a conclusion that it was raining outside. [¶] Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of any charges including intent and mental state and also the acts which are necessary for a conviction. Neither type of evidence is necessarily more reliable than the other You have to decide whether any fact in issue was proved based on all of the evidence.”

² CALCRIM No. 302 as read to the jury by the court states: “If you determine there is a conflict in the evidence, you, the jury, must decide what evidence, if any, you believe. Don’t simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number. But don’t disregard the testimony of the greater number or any witness without reason or because of a prejudice or a desire to favor one side. What’s important is whether the testimony or other evidence actually convinces you, not the number of witnesses who testify on any given point.”

502 U.S. 62, 72; *People v. McPeters* (1992) 2 Cal.4th 1148, 1191.) Jurors are presumed to be intelligent people capable of understanding and correlating jury instructions. (*People v. Carey* (2007) 41 Cal.4th 109, 130.)

In CALCRIM No. 223, defendant objects to the following language, “to prove *or disprove* the elements of a charge.” He says the instruction “suggests the defense must do more than raise a reasonable doubt to merit an acquittal.” Defendant’s jury was also instructed with CALCRIM No. 220 in which it was told he was presumed to be innocent, and that presumption “requires that the People prove a defendant guilty beyond a reasonable doubt.”

He says CALCRIM No. 302 tells jurors that in resolving a conflict in the evidence, they must decide which evidence to believe. He says the instruction’s directive that jurors must decide what evidence to believe in case of a conflict is incorrect because exculpatory evidence need not be believed in order to raise a reasonable doubt. CALCRIM No. 220 told the jury: “Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty.”

Defendant parses the language of the instructions to construct an argument he has been denied due process and a fair trial, and cites no law to support his contentions. Similar arguments about the same instructions have been rejected in *People v. Golde* (2008) 163 Cal.App.4th 101, *People v. Ibarra* (2007) 156 Cal.App.4th 1174 and *People v. Anderson* (2007) 152 Cal.App.4th 919. We also reject these arguments.

III
DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.